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No. 87-1381

In the

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH B. MARGOLIN,

Petitioner,

v.

BOARD OF EDUCATION, COMMACK UNION FREE SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Was petitioner's vague and generic use of terms such as "due process" and "equal protection" sufficient to have raised a substantial federal question within the State Court proceedings where the petitioner never made specific reference to the Federal Constitution as opposed to the Constitution of the State of New York, and the State Courts, including the Court of Appeals, failed to pass upon a Federal constitutional question?

2. Does the New York State Court of Appeals' determination that a member of a public sector employees' union may not individually enforce a substantive provision of the collective bargaining agreement by way of an appeal to the State Commissioner of Education, absent a showing that the union breached its duty of fair representation, deny that union member equal protection or due process of law under the Federal Constitution?

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Jurisdiction

The jurisdiction of this Court is *not* invoked pursuant to 28 U.S.C. §1257(3) because no question of federal law is presented herein.

Statutes Involved

It is respondent's position that no federal constitutional provisions or statutes are involved. The only State statute involved in the case that was omitted by petitioner is N.Y. Civil Service Law §§200 *et seq.* (McKinney, Volume 9).

Statement of the Case

Petitioner is a tenured teacher employed by the respondent (2a).[1] Pursuant to the provisions of the collective bargaining agreement (the "Contract") entered into by the

[1] Numbers followed by the small letter "a" in parentheses refer to the appendix to the Petition for Writ of Certiorari.

respondent and the Commack Teachers' Association (the "Union"), the duly recognized and acting collective bargaining representative for all teachers employed by respondent, petitioner filed a grievance claiming that his seniority was not properly considered within the context of a class assignment (75a). Specifically, petitioner alleged that his assignment to teach one class a week outside of his normal subject area of social studies, rather than assigning a less senior teacher, violated Article XVIII of the Contract, which provides in part (67a):

> All other factors being equal, seniority shall prevail with respect to class assignments and duties . . . .

At each of the three steps in the grievance process, petitioner's grievance was denied on the basis that there were factors other than seniority which favored less senior teachers and, therefore, the challenged assignment was made in accordance with Article XVIII of the Contract (81a-100a). The Union, after an independent investigation, found petitioner's grievance to be without merit and declined to invoke the arbitration stage of the internal grievance procedure (79a-80a). Under the terms of the Contract, only the Union could demand the arbitration of a grievance (72a).

Having failed to obtain relief within the context of the Contract's internal grievance procedure, petitioner instituted an appeal to the New York State Commissioner of Education (the "Commissioner"), pursuant to §310 of the State *Education Law* (102a-106a). In his petition to the Commissioner, petitioner presented the same arguments he had unsuccessfully made both to the District and his own Union during the various stages of the grievance (8a-9a). Essentially, he sought to individually enforce a substantive contractual provision outside of the internal grievance machinery provided for in the very same contract.

In its Answer before the Commissioner, respondent, *inter alia*, raised as an affirmative defense the fact that petitioner had failed to allege that the determination of the Union not to carry the grievance to arbitration constituted a breach of its duty to fairly represent the petitioner (9a-10a).

By Decision dated April 30, 1985, the Commissioner sustained petitioner's appeal, holding that petitioner could individually enforce Article XVIII of the Contract by means of an administrative appeal to the Commissioner of Education (55a-64a).

The respondent thereafter commenced a special proceeding pursuant to Article 78 of the *Civil Practice Law and Rules* of the State of New York, seeking to annul the Commissioner's determination. The Supreme Court of Albany County dismissed the proceeding without opinion (51a). A sharply divided panel of the Appellate Division, Third Department (3 to 2) affirmed (27a-47a). The New York State Court of Appeals unanimously reversed the Appellate Division's dismissal of the Article 78 Petition and annulled the challenged determination of the Commissioner of Education (1a-26a). In doing so, the Court of Appeals held that (1a-2a):

> A teacher alleging breach of a provision of the collective bargaining agreement between the school district and the union, having exhausted the grievance process established by the agreement and claiming no breach of the union's duty of fair representation, cannot then petition the Commissioner of Education under Education Law §310 for relief on that same grievance.

In short, the Court concluded that "without a showing that the Union breached its duty of fair representation in prosecuting [the] grievance," petitioner could not resort to

"additional remedies" outside of the internal grievance process to enforce a substantive right under the Contract. (23a-24a).

Petitioner now seeks a Writ of Certiorari to review the determination of the New York State Court of Appeals.

REASONS FOR DENYING THE WRIT

POINT I

This Court lacks jurisdiction to entertain the present petition because no federal question was raised below.

Petitioner failed to raise within the State Court proceedings any question involving a Federal Constitutional Provision or Statute. Indeed, the New York State Court of Appeals did not pass upon a federal question, but based its decision solely upon an interpretation of State law. For these reasons, which are more fully set forth below, the petition must be dismissed for want of federal jurisdiction.

A. Petitioner's vague use of generic terms such as "due process" and "equal protection" in his State Court pleadings were insufficient to raise a *bona fide* federal question.

It is well settled that in order for this Court to have jurisdiction to review a determination of a State's highest Court, "some provision of the Federal, as distinguished from the State, Constitution [must be] relied upon, and such provision must be set forth." *New York Central and H.R. Co. v. New York*, 186 U.S. 269, 273 (1902). Thus, if a petitioner claims that a State Statute is "unconstitutional" or that it violates "equal protection" and/or "due process", it will be assumed that reference is being made to the State Constitution and rights thereunder rather than to the Federal Constitution. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928). This is especially true

where, as here, the applicable State Constitution contains a due process clause and an equal protection clause. *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914).

In the present case, petitioner used terms such as "due process" and "equal protection" in their generic sense and did not specifically delineate that he was claiming a violation of the Federal Constitution as opposed to the State Constitution. For example, in Paragraph Twenty-Second of his petition to the Commissioner of Education, petitioner makes the vague assertion that "it is at least questionable whether the three stages of the grievance machinery afforded justice and equal protection for the petitioner." (105a). Since the New York State Constitution contains both an equal protection clause (Article I, Section 11) and a due process clause (Article I, Section 6), such allegations must be presumed to implicate the New York State Constitution, if they are sufficient to raise a Constitutional claim at all.

The fact that the New York State Court of Appeals failed to address a Federal Constitutional issue further points up petitioner's failure to properly raise such an issue in the State Court proceedings. It is well settled that when the highest State Court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the burden of showing that the federal question was in fact properly raised, so that the State Court's failure to deal with it was not for want of proper presentation. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983). As this Court stated in *Street v. New York*, 394 U.S. 576, 582 (1969), when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." In view of petitioner's vague illusions to "equal protection" and "due

process" (110a, 113a), it is not surprising that the New York State Court of Appeals failed to perceive *any* Constitutional issue, let alone one implicating a federal question.

B. This Court lacks jurisdiction because the New York State Court of Appeals decided only issues of State Law.

As stated earlier, the New York State Court of Appeals did not pass upon any federal issues, but reached the subject determination through its construction of applicable State Law. Specifically, the Court of Appeals balanced the provisions of the *Civil Service Law* which encourage public employers and unions to resolve labor disputes through contractual grievance procedures against the provisions of the *Education Law* which grant the Commissioner of Education broad jurisdiction in reviewing actions of local school officials. In this regard, the Court of Appeals held (18a-19a):

> It is the policy of this State "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law §200). This policy is "best effectuated" by "encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes." (Civil Service Law §200[c]). The Taylor Law further grants to public employees the right to be represented by unions to negotiate the terms and conditions of their employment "and the administration of grievances arising thereunder." (Civil Service Law §203) . . . . Permitting employees to prosecute alleged violations of the agreement beyond the contractual grievance procedure obviously unsettles the finality of grievance determinations that are central to implementation of

State policy, and the right to bring such proceedings is therefore restricted.

The Court of Appeals turned next to the "relation of these principles to the broad powers granted the Commissioner under the Education Law" (19a), and determined that the Commissioner's "broad review powers are not, however, unlimited" (22a). The Court concluded that allowing the Commissioner of Education to act as a "super arbitrator" pursuant to §310 of the *Education Law* would severely undercut "the Civil Service Law objective underlying collective bargaining in public sector employment" (23a). Thus, individual employees were barred from enforcing substantive provisions of the collective bargaining agreements through appeals to the Commissioner, absent a showing that the union breached its duty of fair representation (23a-24a).

It is evident from the foregoing that this case is bereft of any federal issues and is simply just not the type of case which falls within this Court's limited appellate jurisdiction.

POINT II

Assuming, *arguendo*, that this Court does possess jurisdiction pursuant to 28 U.S.C. §1257(3), the New York State Court of Appeals' determination is not violative of petitioner's constitutional right to equal protection and due process of law.

In the present case, the New York State Court of Appeals held that a union's decision to conclude the grievance process short of the final step allowed by contract, must be binding upon the employee, absent a breach of the union's "duty of fair representation in prosecuting the employee's grievance." (23a).

It is petitioner's contention that by barring him from enforcing substantive Contract provisions outside the pro-

cedural mechanisms contained in the Contract, the Court of Appeals deprived him of a property interest without due process of law, and denied him equal protection under the law. However, in reaching its determination, the Court of Appeals borrowed heavily from Federal Labor Law policy which strongly favors the finality of internal grievance procedures (15a-17a). Citing this Court's decisions in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) and *Teamsters Local v. Lucas Flower Co.*, 369 U.S. 95, 103 (1964), the Court of Appeals recognized that an individual employee gives up to his union, as his representative, his individual right to enforce the collective bargaining agreement. The Court of Appeals also cited this Court's decision in *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967), where the Court explained the dangers of affording an individual union member the absolute right to compel arbitration or seek redress in an alternative forum as follows:

> . . . The settlement machinery provided by the contract will be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. (Citations omitted). It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L.M.R.A. §203(d).

Thus, the public policy considerations adopted by the Court of Appeals have been sustained numerous times by this Court.

Additionally, petitioner was afforded procedural due process, in that he was given an opportunity to be heard, to present evidence, and received a written decision based upon the evidence presented at each step of the grievance process. The Union's refusal to take the grievance to arbitration did not deprive petitioner of procedural due process. Both the New York State Court of Appeals in the decision below, and this Court in the *Vaca* case, recognized the potential problem of union misconduct and provided an escape valve from the internal grievance process by allowing an employee to individually seek enforcement of his contractual rights only when he has been "prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." (Emphasis in original). *Id.*, 386 U.S. at 185. It should be noted that the petitioner did not allege before the Commissioner that his union had breached its duty to fairly represent him. However, petitioner did commence a separate proceeding before the New York State Public Employment Relations Board ("PERB") alleging that the Union had violated its duty of fair representation. After an evidentiary hearing, this claim was rejected by PERB. *Matter of Commack Teachers Association*, 19 PERB 3019, *aff'd* ___ A.D.2d ___, 520 N.Y.S.2d 226 (3rd Dept. 1987). Petitioner has received all the legal process that is due him and only submits this petition because he is dissatisfied with the results obtained.

In sum, the initial three stages of the internal grievance process, coupled with the administrative review of the Union's determination not to invoke arbitration, adequately provided petitioner with the procedural due process and equal protection required by the United States Constitution. This Court has consistently sustained the current Federal system governing collective bargaining and labor relations. There is thus no need for it to review a State system which is modeled upon the Federal.

CONCLUSION

For the reasons stated above, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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